

Opinions and Advice

Quarterly Summary

Office of the
Maryland Attorney General



January – March 2010

OPINIONS

CORPORATIONS

EXECUTIVE COMPENSATION – WHETHER EXECUTIVE COMPENSATION MAY CONSTITUTE A “WASTE” OF CORPORATE ASSETS AND HOW SUCH COMPENSATION MAY BE REGULATED

Question 1: Can payment of excessive executive compensation constitute a waste of corporate assets.

Answer: Yes, if no reasonable board of directors would approve such compensation. The courts usually defer to decisions of a board of directors on an issue such as executive compensation under the “business judgment rule,” also referred to by the Court of Appeals as the “principle of non-intervention.” This principle also depends in part on whether the directors acted in good faith.

Question 2: May a State official initiate a quo warranto action under Annotated Code of Maryland, Corporations & Associations Article (“CA”), §1-403(d) to challenge the payment of executive compensation at a private company?

Answer:

Allegations of corporate waste are typically litigated in the context of a shareholder derivative action, rather than a quo warranto action.

CA §1-403(d) was part of the Model Business Corporation Act, as adopted in Maryland some years ago. Under that statute, the Attorney General retains authority to seek injunctive relief or dissolution of a corporation that engages in unauthorized or “ultra vires” actions. There are few cases in the last century in which state Attorneys General have exercised this authority and none challenging corporate decisions as to executive compensation.

Question 3: Could the General Assembly lawfully restrict executive compensation through legislation?

Answer: The General Assembly has authority to enact legislation regulating executive compensation at Maryland corporations and businesses. There will be issues of retroactivity and vested rights to

the extent such legislation attempted to alter compensation due under existing agreements.

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March 8, 2010

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FAMILY LAW

MARRIAGE – WHETHER OUT-OF-STATE SAME-SEX MARRIAGE THAT IS VALID IN THE STATE OF CELEBRATION MAY BE RECOGNIZED IN MARYLAND

Question 1: May Maryland recognize same-sex marriages legally performed in other jurisdictions, including other countries?

Answer: Yes. Such marriages may be recognized in several ways. First, legislation enacted by the General Assembly could provide for recognition of out-of-state same-sex marriages generally, or for particular purposes.

Second, in the absence of legislation, the Court of Appeals, applying common law choice-of-law principles, could decide that such marriages will be recognized in Maryland, either generally or in particular circumstances.

Finally, a State agency may also address the recognition of out-of-state marriages on particular matters within that agency’s jurisdiction, so long as the agency’s action is consistent with any relevant statutes and court decisions, including federal laws that may govern the agency’s activities.

In applying choice of law rules, the Court of Appeals would start from the general principle that a marriage that is valid in the place of celebration remains valid in Maryland. There is an exception to that rule if the particular marriage is contrary to a strong State public policy. A statute that limits marriage in Maryland to opposite-sex couples could be said to embody a policy against same-sex marriage. However, there are many restrictions in the State’s marriage statutes and the Court of Appeals has not construed the public policy exception to encompass all those restrictions. For example, it has recognized common law

marriages from other states, although there is no common law marriage in Maryland, and has recognized a Rhode Island marriage between an uncle and a niece, although a statute prohibits marriage between an uncle and a niece in Maryland. Indeed, the public policy exception is a very limited one that the Court has seldom invoked.

While the matter is not free from all doubt, in our view, the Court is likely to respect the law of other states and recognize a same-sex marriage contracted validly in another jurisdiction. In light of Maryland's developing public policy concerning intimate same-sex relationships, the Court would not readily invoke the public policy exception to the usual rule of recognition.

Question 2: Can a Maryland Governor issue an executive order concerning recognition of such marriages.

Answer: The Governor cannot legislate through an executive order. An executive order of the Governor must be consistent with existing Maryland law, as enacted by the General Assembly and construed by the courts.

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NATURAL RESOURCES

STATE ENDANGERED SPECIES ACT – RESPONSIBILITIES OF THE DEPARTMENT OF NATURAL RESOURCES, THE PUBLIC SERVICE COMMISSION, AND OTHER AGENCIES UNDER THE ENDANGERED SPECIES ACT

Question: What are the responsibilities of the Department of Natural Resources ("DNR"), the Public Service Commission ("PSC"), and other agencies under the State Endangered Species Act? With reference to *Animal Welfare Institute v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009), a case involving the federal Endangered Species Act, does State law similarly prohibit a corporation from setting up wind turbines that may lead to the taking of endangered species?

Answer: In comparison to the federal statute, the State endangered species law provides similar, although not identical, protections for federal- and State-listed threatened and endangered species. Given that the State law was patterned after the federal statute, Maryland courts construing the State statute are likely to apply the standards

developed under the federal statute. In *Beech Ridge*, the federal district court granted an injunction against a wind energy project in West Virginia after it was demonstrated that the project was "reasonably certain" imminently to harm, kill, or wound a listed endangered species and the developer of the project had not obtained a permit allowing the incidental taking of an endangered species.

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TAXATION

CORPORATE INCOME TAX – WHETHER FEDERAL STIMULUS GRANT RECEIVED BY A PUBLIC UTILITY WOULD BE SUBJECT TO MARYLAND INCOME TAX

Question: Are federal stimulus funds that were received as part of the American Recovery & Reinvestment Act of 2009 ("ARRA") by a Maryland public utility subject to state taxes. In particular would a federal stimulus grant received by a public utility for up to 50% of the costs of an Advanced Meter Infrastructure regulatory asset be subject to Maryland income tax?

Answer: Yes. A Maryland public utility receiving a grant under ARRA for the costs of such a regulatory asset would be required to pay Maryland income tax on the grant.

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ADVICE LETTERS

AGRICULTURE LAND PRESERVATION
Easements

Annotated Code of Maryland, Agriculture Article ("AG"), §2-513(b) allows a landowner who sells a land preservation easement to the Maryland Agricultural Land Preservation Foundation ("MALPF") the choice of reserving in the deed of easement up to three restricted lots or one unrestricted lot for residential development.

AG §2-513(b) does not specifically address how many restricted or unrestricted lots a landowner is entitled to claim if the landowner sells multiple easements to MALPF. MALPF has addressed this issue, in part, by trying to follow the general principle that limits the landowner who sells multiple easements on the same farm to a total of three restricted lots. This is done to prevent landowners from selling land preservation easements to MALPF in stages under separate easements in order to increase residential development lot rights. However, MALPF has not adopted a policy on the number of allowable lots for a landowner who sells multiple easements to MALPF on separate nearby farms in the same geographical area.

Question 1: Does the language of AG §2-513(b)(3) allow MALPF to approve a landowner's request for an unrestricted lot on any farm subject to easement restrictions where the same landowner is not entitled to reserve a restricted lot?

Answer: A landowner must qualify for and relinquish all rights to any restricted lot before choosing an unrestricted one. At the time the landowner seeks approval for an owner's lot and/or a child's lot, the landowner has, by definition, relinquished the right to an unrestricted lot on a farm.

Question 2: What is the total number of allowable lots that a landowner may reserve who sells multiple land preservation easements to MALPF?

Answer: This is a matter on which MALPF may draft regulations.

Letter to
[Honorable Earl F. Hance](#)
Secretary, Department of Agriculture
February 3, 2010

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CABLE TELEVISION – REGULATION **Cable Companies – Equipment – Preemption**

Question: Would legislation requiring the sale of equipment that is now rented by cable customers in order to receive cable service be preempted by federal law?

Answer: Federal law expressly requires the FCC, subject to certain security conditions, to adopt regulations to ensure the availability of converter boxes and other equipment used to access programming from sources other than their cable

company. Accordingly, the FCC has adopted regulations requiring cable companies to permit the connection or use of "navigation devices" made by third parties to or with their system except in circumstances where electronic or physical harm or unauthorized receipt of service would occur. The Federal Telecommunications Act provisions permit states to exercise jurisdiction with regard to cable services consistent with federal law, but preempt any state law that is inconsistent with federal law. While federal law preemption of regulation clearly refers to converter boxes / navigation devices, it is less clear about restrictions on the use of a type of subscriber equipment. It appears, however, that State legislation to require sale of equipment that is now rented, or to expressly require that cable companies allow use of competing equipment would be preempted by federal law.

Letter to
[Delegate C. William Frick](#)
February 5, 2010

Community Access

Question: What State laws are currently in place concerning State regulation of the cable television industry? What is the role of the federal government regarding regulation of local cable systems – especially community access?

Answer: There are very few State laws that govern cable television. Early FCC regulation established a dual regulatory scheme under which local governments would be responsible for selecting franchises, while the FCC retained authority over all operational aspects of cable communication. Although subsequent enactment of the Cable Communications Policy Act of 1984 and the Cable Television Protection and Competition Act of 1991 gave the States greater power to regulate, substantial authority remains in the hands of the FCC. Federal law does not require that channel capacity be set aside for community access, but authorizes local franchising authorities to do so.

Letter to
[Delegate Pat McDonough](#)
March 22, 2010

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DOMESTIC PARTNERS
Inheritance Tax – Estates and Trusts

During its 2009 session, the General Assembly created an exemption from the State inheritance tax for a domestic partner of a decedent. The exemption applies with respect to an interest in a joint primary residence that (1) at the time of death was held in a joint tenancy by the decedent and the domestic partner and (2) passes from the decedent to or for the use of the domestic partner. Chapter 602, Laws of Maryland 2009 codified at Annotated Code of Maryland, Tax-General Article ("TG"), §7-203(l)(2). The exemption applies with respect to the estates of individuals who die on or after July 1, 2009. One who asserts a domestic partnership must provide evidence of the partnership consisting of (1) an affidavit and (2) two examples of certain records that document the partnership.

Question: Must the affidavit and other evidence be presented to the register of wills to obtain the exemption?

Answer: Yes.

Letter to
[Senator John C. Astle](#)
February 2, 2010

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JURY SERVICE
Unemployment

Question: A suggestion has been made to create a program to encourage the selection of the unemployed to serve on juries. Would such a program raise legal or constitutional problems?

Answer: While the State may add names from lists of the unemployed to the pool from which jurors are chosen, any system intended to raise the representation of the unemployed over the employed in the creation of jury pools, may result in the intentional exclusion of a "cognizable group or class of qualified citizens," which would raise serious constitutional for failure to properly draw from a fair cross-section of the community, and risks the reversal of cases on which those juries sat.

Letter to
[Senator Katherine Klausmeier](#)
February 1, 2010

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MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION

Parks – Bi-County Agencies – Delegation

The Maryland-National Capital Park and Planning Commission ("MNCPPC") entered into a long-term lease with and the Montgomery County Revenue Authority ("Revenue Authority") to operate golf courses owned by MNCPPC.

Question 1: Did MNCPPC have authority to enter into the lease agreement?

Answer: Yes.

Question 2: Could that lease agreement properly prohibit it from operating a golf course that is "extracted" from the agreement and returned to the direct control of MNCPPC?

Answer: MNCPPC lacked authority to delegate to another agency, for nearly 40 years, its discretion to decide whether MNCPPC could continue to operate a golf course returned to its control. Of course, this does not mean that MNCPPC would be required to continue to operate any particular park as a golf course if MNCPPC itself concluded that it is not financially feasible or there are other more suitable park uses for the property.

Letter to
[Delegate Benjamin E. Kramer](#)
March 17, 2010

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OPEN MEETINGS ACT
Closed Meeting Votes

Question: When a public body closes a meeting under the Open Meetings Act, certain procedures must be followed. Does the Act require that votes taken during meetings closed under the Act be made public?

Answer: While the Act requires that a public body make public the actual vote to support closing a meeting, it does not require disclosing the individual votes of each member concerning any action taken during a closed meeting.

Letter to
[Senator Bryan W. Simonaire](#)
February 12, 2010

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PUBLIC INFORMATION
Family Educational Rights and Privacy Act –
Colleges and Universities –
Educational Records

Question: Are journalists, including students at the University of Maryland College of Journalism, able to obtain information about individuals charged with violating University rules relating to sexual abuse? In particular, may student journalists obtain the identities of individuals who have been charged and who have been found to have violated these rules?

Answer: If a University disciplinary proceeding determines that a student has violated University policies or rules concerning a matter related to sexual abuse in the form of a forcible sexual offense, statutory rape, or incest, the student's identity is subject to disclosure under the Maryland Public Information Act ("PIA"). Otherwise, the accused student's identity is protected from disclosure by virtue of a federal law relating to education records at the University.

Letter to
[Delegate William A. Bronrott](#)
March 3, 2010

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SCHOOL BOARDS
Student Members

Question: Is there a legal or constitutional impediment to legislation adding a student member to the Carroll County School Board and allowing that student member a vote?

Answer: As noted in the attached list, local school boards in Maryland are split between elected and appointed boards. There is also a variety of ways in which student members may participate on different local school boards. While adding a student member to the Carroll County school board and allowing that member to vote might be perceived as reducing the voting power of elected adult members on the board, this minor change would not be unconstitutional.

Letter to
[Delegate Susan W. Krebs](#)
January 18, 2010

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WORKPLACE FRAUD
Employee Classification

Question: Chapter 188 (Senate Bill 909) of 2009, "Workplace Fraud Act of 2009," created a new subtitle of the Labor and Employment Article, expressly prohibited the misclassification of employees in the construction and landscaping industries created two new offenses of misclassification: failure to properly classify an individual who performs work for remuneration by the employer, and knowing failure to properly classify an individual who performs work for remuneration paid by the employer. Does the Act alter the burden of proof under existing law?

Answer: While misclassification of employees has never been permissible, previous law had no central enforcement and no penalties other than to make the payments that had been avoided the misclassification. The burden of proof initially is on the State as it was under prior law.

Letter to
[Senator Robert A. Zirkin](#)
March 1, 2010

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The Opinions and Advice Quarterly Summary summarizes formal opinions of the Attorney General. Also included are letters of advice by Assistant Attorneys General that have been issued on the understanding that they may be made public. (Other advice provided by the OAG may be confidential under the attorney-client privilege.)

Copies of opinions may be obtained from the Attorney General's website at www.oag.state.md.us/opinions/index.htm. There is a direct link to each advice letter at the end of its description in the electronic version of this newsletter.

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